Supreme Court, U.S.
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No. 99-628

In The

Supreme Court of the United States

CYNTHIA ANDREWS, *et vir, et al.*,

Petitioners,

v.

VERMONT DEPARTMENT OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Vermont Supreme Court

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The question presented in this case is whether the First Amendment allows government to discriminate on the basis of religion in funding school-choice education programs that include private schools. In the Petition, we showed (1) that this issue is nationally important; (2) that this issue is recurrent; and (3) that this issue has generated extraordinary and pervasive conflicts among lower and federal state courts, and between decisions of lower courts and this Court.

The briefs in opposition do not dispute these points. Indeed, respondents concede that the constitutional issues surrounding various school choice programs are important. Intervenor Op. at 10-11 (referring to "fundamental federal constitutional issue" presented under Establishment Clause); *id.* at 12 (characterizing Free Speech and Establishment questions as "crucial"). *Cf.* State Op. at 8-13. Respondents simply question whether this case presents *an appropriate vehicle* for addressing these important issues (State Op. at 5-8; Intervenor Op. at 9-12) and argue that, in any event, the decision below is correct on the merits (State Op. at 8-13).

We think the issue is fairly joined at this point: Is this case an appropriate vehicle for addressing an undeniably important set of First Amendment issues on which the lower courts are badly divided and in need of direction? This Reply Brief will focus chiefly on that question.

1. Since the Petition was filed, there have been some relevant developments. First, this Court has denied certiorari in two cases presenting issues similar to the ones presented here, with respect to a Maine tuition reimbursement statute, *Bagley v. Raymond School Dep't*, 728 A.2d 127 (Me.), *cert. denied*, 120 S.Ct. 364 (1999); *Strout v. Albanese*, 178 F.3d 57 (1st Cir.), *cert. denied*, 120 S.Ct. 329 (1999), and has also denied certiorari in a case presenting an Establishment Clause challenge to a somewhat different state school-choice program. *Kotterman v. Killian*, 193 Ariz. 273, 972 P.2d 606, *cert. denied*, 120 S.Ct. 283 (1999). These cases obviously highlight the recurring nature of the issues presented here. We do not know whether certain features of those cases might have

made them less than ideal vehicles for considering the constitutional issues surrounding school choice programs. It is clear, however, from another new development, that this Court considers the First Amendment issues involved to be *important*: Just a few weeks ago, this Court granted a stay of a preliminary injunction issued by a federal district judge against the inclusion of students attending religious schools in a school-choice program for disadvantaged children in Cleveland, Ohio. *Zelman v. Simmons-Harris*, 1999 WL 1007170 (U.S. Nov. 5, 1999).

The grant of a stay in the Cleveland case is, we submit, of special significance: the district court's preliminary injunction in that case had precisely the same effect on that program as the Vermont Supreme Court's decision has had in the instant case: court-mandated discrimination on the basis of religion in an otherwise facially religion-neutral school-choice program. This Court's decisions in stay application cases have noted that an application under the circumstances of *Zelman* will be granted only if there is (i) a reasonable possibility that four Justices will vote to grant certiorari; and (ii) a "fair prospect" or "significant possibility" that a majority of the Court will conclude that the decision below was erroneous. STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE (7th ed. 1993) § 17.19 at 693 (collecting cases). The prospect of irreparable injury resulting from a lower court's order is also a relevant factor. *Id.* at 692-93. The grant of the stay in *Zelman*, we respectfully submit, suggests both a strong likelihood that the decision of the district court in *Zelman* is erroneous and that the error would result in irreparable injury to the families involved, absent a stay.

These same factors strongly counsel review in the instant case. The decision of the Vermont Supreme Court accomplishes the same injury as did the district court's preliminary injunction in *Zelman*: exclusion of hundreds of families from the benefits of a neutral tuition-benefit program, solely on the ground of the religious nature and content of a family's chosen school. The decision of the Vermont Supreme Court presents essentially the same issues as *Zelman* and is equally likely – indeed, we submit, more likely – wrong on the merits:

the Vermont Supreme Court held, incredibly in our view, that a state education agency may single out "religion, religious ideas, religious people, or religious schools" (*Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part)) for direct discriminatory exclusion from a facially-neutral government program, *even assuming that the Establishment Clause does not require such discrimination*, and further held that such discrimination does not violate the Free Exercise Clause *even when the discrimination is explicitly based on the degree of religious content, values, and viewpoints in a religious school's curriculum.*

With respect, we submit that this holding makes a compelling case for this Court's review. It is clear that the questions presented are important and will not go away until this Court resolves them. The lower courts are hopelessly divided on these fundamental points of law, with no consensus even remotely in view. *See* Pet. at 15-19.

2. We submit that the key features of the Vermont program, and the factual record, make this case an excellent vehicle for considering the important First Amendment issues involved:

- The Vermont program, as adopted by the state legislature, does not discriminate on the basis of religion, but instead authorizes tuition payments or reimbursement to any approved school, public, private nonreligious, or private religious. The local school district in this case (the town of Chittenden), the democratically elected body closest to the people, wished to provide tuition payments pursuant to the statute on a religion-neutral basis, but were forbidden to do so by state education officials. The discrimination on the basis of religion in this case arises from the decision of state education bureaucrats and judges, *not* from the statute itself or the actions of the local school board.[1]

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[1] This differs from the arrangement at issue in the Maine cases, where the legislature has chosen to exclude from the tuition reimbursement

- The Vermont program is not experimental or newfangled. It is a traditional program of long standing, in place in the State of Vermont for over 130 years.
- The Vermont program is genuinely and reliable neutral with respect to religion. It involves no discretionary funding by the State. Any tuition payments or reimbursements flow to religious schools only as a result of the private decisions of parents. The program is in no way skewed toward religion, in theory or in practice. The Record below shows that 67.2% of families in the year in question used the benefit to attend public schools and only 32.8% of the families – less than a third – used the benefit to attend private schools. Further, the Record shows that *less than a third of the eligible private schools are religiously-affiliated*. *See* Pet. at 4, n.2.
- The Record shows that the tuition payments under the Vermont program in this case *do not cover the full cost of attendance at the religious school*, but cover only about 50-60% of actual instructional costs, the remainder being provided by private funds. There is thus little doubt, on these facts, that the Vermont program does not effectively "subsidize" the religious component of the school's instructional program (to the

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program religiously-affiliated schools. *See Bagley, supra*; *Strout, supra*. We do not mean to suggest that the constitutional issues should come out differently in these two situations. We merely note that the petitions in the Maine cases would have called upon this Court to overturn the acts of a democratically-elected legislature. This petition asks the Court to *sustain* the constitutionality of the legislative act in question.

As noted in the Petition, a change in the composition of the Chittenden Town School District led it to abandon this litigation and assume a neutral position. Pet. at 6 n.5. The school district has not filed a brief in opposition.

extent such elements might be thought separable). The potentially complicating issue of *de facto* economic subsidy to the religious element of the school's mission is simply not presented on the facts of this case.

- There is no dispute about the quality, under secular standards, of the educational program of the school petitioners seek to attend. *See* Pet. at 4 n.3, Pet. App. 5. Indeed, there is no dispute about the quality of any of the schools that are qualified, under state criteria, to accept students under the tuition payment program.
- At the same time, the Vermont program, as authoritatively construed by the Vermont courts, involves no regulation of the instructional program or employment practices of religious schools, thus presenting no issue of state "entanglement" in the operations, content, or institutional autonomy of religious schools. Ironically, that is precisely what the Vermont Supreme Court found objectionable: the fact that the tuition program imposed no religious-content or religious-viewpoint restrictions on the schools families choose. Pet. App. 11-12, 52. The Vermont Court thought that the program would be permissible . . . *if* better controls were in place to prevent a religious school from engaging in the expression of religious messages, values, and ideas in the course of providing a quality education. *Id.* at 11-12, 53.
- This case thus presents, squarely and singularly, the important issue of *discrimination against religion*. The explicit ground of decision by the Vermont Supreme Court was that state law (specifically, Chapter I, Article 3 of the Vermont Constitution) *requires* discrimination on the basis of religion in administration of the tuition program and that the program violates state law to the extent that it does not discriminate on the

basis of *how religious* a school is in its education program. Pet. App. at 11 & n.6; 51-52.

3. The intervenor-respondents maintain that this case is not an appropriate vehicle for review because "no Establishment Clause question is presented in this case." Intervenor Op. at 10. These respondents characterize the Establishment Clause issue as "fundamental" and "crucial." *Id.* at 10, 12. The State respondents, however, explicitly invoke this Court's Establishment Clause cases as justification for the decision below, State Op. at 8-10, thus raising the "crucial" issue their co-party thought so sadly absent.

The State's brief makes clear that, were certiorari granted, the State would defend the judgment below on the ground (among others) that equal treatment of religious schools under the statute violates the Establishment Clause. We believe this argument would have been available to the State in any event, as a ground supporting affirmance. The issue was argued below, and the fact that the *opinion* below does not rely on this ground is not dispositive. In any event, the Vermont Supreme Court's views on this question are set forth in *Campbell v. Manchester Board of School Directors*, 161 Vt. 441, 641 A.2d 352 (1994). The Vermont Supreme Court, like the Wisconsin, Arizona and Ohio highest state courts, has found no Establishment Clause violation in a neutral school choice program that includes religious schools. The Maine Supreme Court, the First Circuit, and the Northern District of Ohio have reached precisely the opposite conclusion. *See* Pet. at 19. This undeniably important issue, which has produced a massive split among lower courts, is clearly present in this case as part of the State's defense to petitioners' constitutional claims. Neither set of respondents attempts to deny the existence of the conflict or the importance of the issue.

4. Both sets of respondents say that the facts of this case do not even *present* an issue under the Free Exercise Clause. State Op. at 5-6; Intervenor Op. at 13-14. If respondents are sincere in this, they have made out a compelling case for *granting* certiorari: It is bad enough that state and

local governmental officials often make the mistake of thinking that they are *required to discriminate against religion* in education benefit programs (State Op. at 8-10) – the Establishment Clause issue. It is even worse if such officials believe – as the state officials here appear to believe – that, even if the Establishment Clause does not require religion-based exclusion from government education programs, such discrimination in any event is *permissible* under the Free Exercise Clause, on the theory that (1) the right of free exercise does not apply to such discrimination unless a specific religious tenet requires attendance at a religious school, *id.* at 6 ("none of the petitioners claimed . . . the Catholic church mandated such an education"); and (2) the Free Exercise Clause does not apply to programs involving expenditure of funds for an education program or benefit. *Id.* at 12-13.

With all due respect, this is simply absurd. Under respondents' view, a law prohibiting regular church attendance would, as applied to many Christians and Jews, not raise a Free Exercise Clause issue, since few denominations formally *require* attendance even on important holy days. That is emphatically not the law. As Judge Noonan has persuasively put it: "Francis of Assisi was exercising his religion when he gave his costly clothes to the poor; if a government had tried to prevent the gesture it would have violated his free exercise although he acted from no binding precept. . . . There is nothing in the First Amendment's guarantee of the free exercise of religion that restricts the guarantee to the requirements of a church." *Peterson v. Minidoka County Sch. Dist.*, 118 F.3d 1351, 1357 (9th Cir. 1997) (Noonan, J.).[2]

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[2] The Free Exercise Clause "standing" of the families who specifically mentioned religious reasons for choosing the religious school in this case is clear. We believe that the families who did not list their religious beliefs as the specific motivation for choosing religious education are no less protected by the Free Exercise Clause. Where the nature of the asserted Free Exercise Clause violation is *discrimination against religion*, this Court has not required a separate showing of "substantial burden" on a specific religious practice; the discrimination itself is sufficient to trigger strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S.

Respondents also argue that the Free Exercise Clause is not implicated if government discrimination on the basis of religion occurs in the context of education funding programs. State Op. at 12-13; Intervenor Op. at 17-18. In part, this is simply a repetition of the mistaken view that the Establishment Clause requires or authorizes such discrimination. *See* Pet. at 10 n.8. Insofar as this view rests on a reading of the Free Exercise Clause alone, we showed in the Petition that this view – and the decision below – conflicts directly with the decisions of the Fourth, Sixth, Eighth, and Ninth Circuits, interpreting the Free Exercise Clause,[3] conflicts in principle with this Court's holding in *Church of Lukumi Babalu Aye*, 508 U.S. 520, and conflicts in principle with this Court's free-speech holding in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

Respondents would distinguish these cases (and thus attempt to deny the conflict between this case and such decisions) on the ground that the Free Exercise Clause "does not include the right to have the government pay for a religious education," State Op. at 12, even under a facially neutral program of school choice such as the Vermont program. Respondents characterize the question as one in which petitioners seek "subsidies." *Id.* at 10; Intervenor Op. at 14. Of course, this is misleading in the extreme. Petitioners do not seek "subsidization" but only equal treatment – nondiscrimination – within an existing program. Petitioners do not seek any new financial benefit or special assistance; they

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520, 533-34 (1993); *accord Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995); *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849-850 (3d Cir. 1994); *Rader v. Johnson*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1997).

[3] *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995); *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998); *Zobrest v. Catalina Foothills School District*, 936 F.2d 1190, 1196-97 (9th Cir. 1992), *rev'd on Establishment Clause ground*, 509 U.S. 1 (1993). The decision of the court below is consistent with those of the Maine Supreme Court, the Washington Supreme Court, and the First Circuit. Pet. at 17-18. The result is a direct 4-4 split among lower courts on the Free Exercise issue.

simply want not to be discriminated against in the administration of a program the legislature has already seen fit to adopt and that has been in place for well over a century.

Respondents' position, shorn of its misleading language, merely restates the question for review: *Does the Free Exercise Clause permit government to deny an educational benefit to otherwise eligible parents and children solely on the basis of the religious nature of a family's chosen private school?* The lower courts are sharply divided on this important question; and that question is squarely presented by this case, as the briefs in opposition confirm.

5. Finally, respondents argue that the Free Speech Clause claim is not properly before this Court because it was not raised in the courts below. State Op. at 6-8; Intervenor Op. at 11. This is wrong on two grounds. First, the claim *was* made below, both by the Chittenden School District and by petitioners. *See* Pet. at 9 n.7. It is true that the Vermont Supreme Court did not separately discuss it in the opinion below, but that is not a bar to review; only if an issue is *neither* pressed *nor* passed on below is review inappropriate. *Illinois v. Gates*, 462 U.S. 213, 219-223 (1983). Second, respondents ignore the fact that the Free Speech Clause issue to a significant degree arises *from the content of the Vermont Supreme Court's decision itself.* The opinion below explicitly carves out a distinction in eligibility for the benefit based not simply on whether a school is religious in affiliation, but on *how religious* it is in the "content of that education." Pet. App. 51-52. This surprising holding presents the Free Speech Clause issue, pressed by petitioners in the court below, in even sharper relief than before. Plainly, if this Court were to grant review of the judgment below, that review fairly includes the question whether the Vermont Supreme Court's distinction based on the *content* of a religious school's program is consistent with the First Amendment. That question sounds naturally in the Free Speech Clause, as well as the

Free Exercise Clause, and both provisions were invoked by petitioners in the courts below.[4]

CONCLUSION

For these reasons, and those stated in the Petition, we urge this Court to grant the Writ of Certiorari.

Respectfully submitted,

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[4] Similarly, the issue of discrimination *among* religions, an issue sounding both under the Free Exercise Clause and the Establishment Clause, *see Larson v. Valente*, 456 U.S. 228 (1982), arose as a consequence of the Vermont Supreme Court's decision, and is properly before this Court. *See* Pet. at 26-27.